IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 24, 2007

CARRIE SWINFORD v. JEREMY HUMBERT

Appeal from the Juvenile Court for Carter County
No. J-22653 John W. Walton, Judge

No. E2006-01349-COA-R3-JV - FILED FEBRUARY 16, 2007

The parties to this litigation formerly resided in Tennessee. The plaintiff, Carrie Swinford ("Mother"), gave birth to a daughter on February 15, 2005. Shortly thereafter, Mother filed a "paternity and legitimation" action against Jeremy Humbert ("Father"). Father admitted paternity after a DNA test revealed a 99.997% probability that he was the child's biological father. Both parents sought to be designated as the child's primary residential parent. Approximately six and a half months after the child was born, Mother moved to Ohio. Father is now a resident of North Carolina. Following a trial, the court below designated Mother as the child's primary residential parent and awarded Father co-parenting time of five hours every other Saturday, and five hours every other Sunday. The trial court ordered that Father's time with the child would be limited to visits in the state of Ohio. The trial court encouraged the parties to reach an agreement on increased visitation once the child became familiar with Father. The trial court also indicated to Father that a petition seeking increased co-parenting time could be filed in the event he and Mother were unable to reach an agreement. Father appeals. He claims that the best interest of the child dictates that he have more co-parenting time. Finding no abuse of discretion, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

David L. Leonard, Greeneville, Tennessee, for the appellant, Jeremy Humbert.

Regina L. Shepherd, Elizabethton, Tennessee, for the appellee, Carrie Swinford.

OPINION

I.

This litigation began in March, 2005, when Mother filed her petition for paternity and/or legitimation seeking a determination that Father was the biological father of the subject child. Following Father's admission of paternity, he filed a counter-petition seeking primary residential parent status or, in the alternative, liberal co-parenting time.

Apparently, at some time not specifically identified in the record, Father was awarded co-parenting time by the court. This seems to have occurred when the parties were both still residing in Tennessee. In October, 2005, Mother filed a motion seeking to adjust Father's co-parenting time. According to the motion, Mother, who had been living in Elizabethton, had received a job offer on September 2, 2005. She moved to Washington Court House, Ohio, the following day. Mother claimed her new job resulted in an increase in pay and benefits.[1] The move also meant that Mother would be closer to her family. She requested that the trial court adjust Father's co-parenting time, although Mother did not set forth the specifics of the adjustment she was seeking.

A trial took place in March, 2006. By way of background, prior to Father's relationship with Mother, Father was married to Carol Humbert ("Ms. Humbert"). Father and Ms. Humbert were separated when Father began a relationship with Mother. Father and Ms. Humbert then divorced. According to Mother, after she became pregnant, she and Father were planning to marry, but Father reconciled with Ms. Humbert. Father and Ms. Humbert later remarried. Much of the trial testimony alluded to in Mother's brief is devoted to Mother's asserted concern about Ms. Humbert being violent. This concern results from a single incident that occurred when Father and Ms. Humbert were separated. On this occasion, the Humberts got into an argument and Ms. Humbert, who had been drinking, slammed a storm door shut, causing the glass to break. She was charged with vandalism and public intoxication. Ms. Humbert was later placed on probation. There is nothing in the record indicating that this dispute between Father and Ms. Humbert was anything other than a one-time incident. The trial court stated that it did not believe Ms. Humbert would ever harm the child. The evidence does not preponderate against this finding. Accordingly, this event, standing alone, is not a barrier to Father exercising co-parenting time in the presence of Ms. Humbert.

A substantial amount of the trial testimony was devoted to whether, as Father claims, Mother is a lesbian or bisexual, an allegation that Mother steadfastly denies. As this Court explained in ***Berry v. Berry***, No. E2004-01832-COA-R3-CV, 2005 WL 1277847 (Tenn. Ct. App. E.S., filed May 31, 2005), *no appl. perm. appeal filed*,

> [a] parent's sexual orientation can be a factor that the trial court should consider in making a custody decision, but it does not control the outcome of the case absent evidence of its adverse effect on the child. *In re Parsons*, 914 S.W.2d 889, 894 (Tenn. Ct. App. 1995).

[1] Mother's motion was apparently an attempt to comply with the Parental Relocation Statute, T.C.A. § 36-6-108 (2005). No issue was raised below as to whether the motion complies with that statutory scheme.

> Homosexuality is not a *per se* bar to custody. The key consideration is whether a parent's sexuality has a negative effect on a child's welfare. *In re Parsons*, 914 S.W.2d at 894.

Berry, 2005 WL 1277847, at *3. Whatever Mother's sexual orientation is, there is absolutely no evidence that it has had a negative impact on the child's welfare. Mother's sexual preference, therefore, is of no consequence and we will not discuss it further.

Mother was questioned at trial about whether she denied co-parenting time to Father. Mother testified that before she moved to Ohio, the parties' child was available for visits with Father. However, Mother would not allow Ms. Humbert to be present during visits with the child and would not allow Father to take the child out of Mother's residence.

Father lived in North Carolina when the child was born. He moved to Tennessee approximately six months before Mother moved to Ohio, but he later returned to North Carolina. When Mother moved to Ohio, her annual gross income increased from $36,000 to $39,000. Mother's child care expenses are $390 per month. The child's maternal grandmother takes care of the child when Mother is not available except for every Monday and every other Tuesday when the child is in daycare. At trial, Mother requested that Father's time with the child be supervised because the child, in her words, "does not know him and he does not know her.… [S]he's a year old and she doesn't know him. And that's the main [reason]." When asked why Father did not visit the child more often, Mother stated it was because "he always just wanted to take her," something that Mother would not permit. Notwithstanding this testimony, Mother denied doing anything that would interfere with Father's time with the child. Mother also testified that on a couple of occasions, Father did not show up when they had planned visitation. Since Father now lives in North Carolina, Mother stated she would meet Father half-way if required to do so.

Father testified that he lives in a four bedroom house in Greensboro, North Carolina. Father has a bedroom set up for the child. Father works at a K-Mart distribution center and has annual gross income of $60,000. Father argues that he has made "every effort in the world" to see his daughter, but contends that Mother will not allow him to have anyone present at the visitation. According to Father, this prohibition extends not only to his wife, but also to the child's paternal grandmother. Father described his schedule when he was visiting in Ohio as follows:

> At the time I was working first shift…. So I would get off on Friday afternoons, after working about 12 hours, and drive to Ohio. I would arrive in Ohio about three or 4:00 in the morning. I checked into a hotel room, got a few hours sleep, visit with her on Saturday.
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> On Sunday I would have to wake up in the morning as early as possible, visit while I could, and check out by 11:00 at the hotel room to avoid an extra day's fee at the hotel room, and to give me another

> seven to eight hours of drive time back to North Carolina just so I could get up and go to work on Monday morning.

Father brought his wife on one of the visits in Ohio, but the child's maternal grandfather came outside and told Father that only he would be allowed inside Mother's apartment. Father asked if his wife could at least stand in the corridor and see the child when Father would bring the child there, but the grandfather refused. Father requested at trial that he receive equal co-parenting time with his daughter.

Following the trial, the trial court entered an order legitimating the child and ordering Father to pay prospective child support, retroactive child support, and certain other expenses. The trial court then stated, in relevant part:

> That [Mother] shall be the primary residential parent and [Father] shall have parenting time in Ohio every other Saturday from noon until 5:00 p.m. and every other Sunday for a period of five hours.…
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> That once the minor child is comfortable with [Father], the parties shall attempt to agree to an increased amount of parenting time for the [Father]. In the event the parties cannot agree, the parties may petition the Court to establish a new parenting time schedule.
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> That there had been lots of miscommunication between the parties. The [Father] has not had parenting time with the minor child due to the miscommunication. Thus, [Father] shall not be penalized for not having parenting time with the minor child for purposes of the Child Support Worksheet.

Father appeals, claiming the trial court erred when it failed to grant him more co-parenting time with the child because, in his judgment, the best interest of the child mandates that the child be with him for greater periods of time.

II.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court's factual determinations, a presumption we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no presumption of correctness attaching to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

III.

We note that after the parties presented their proof, the trial court stated to Mother that she was being too overprotective of the child and that she needed to "ease up a little bit." The evidence does not preponderate against this finding. The evidence preponderates that, in her overprotective zeal, Mother has negatively impacted Father's ability to develop a relationship with his daughter. The problem is further exacerbated by the fact that the parties live a substantial distance from each other.

In ***Bunker v. Finks***, No. E2001-01496-COA-R3-CV, 2002 WL 924211 (Tenn. Ct. App. E.S., filed May 8, 2002), *no appl. perm. appeal filed*, we were confronted with a somewhat similar situation involving parents residing in different states. That case also involved a decision by a trial court to limit the father's visitation to the location where the mother lived. We stated:

> Determinations regarding custody and visitation "'are peculiarly within the broad discretion of the trial judge.'" *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988)). In addition, this Court has recognized that custody and visitation decisions "often hinge on subtle factors, including the parents' demeanor and credibility…." *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). Accordingly, on appeal, the Trial Court's custody and visitation decisions will not be reversed absent a showing of abuse of discretion. *Id.*… Under the abuse of discretion standard of review, this Court will not reverse the decision of a trial court "'so long as reasonable minds can disagree as to propriety of the decision made.'" *Eldridge v. Eldridge*, 42 S.W.3d at 85 (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000) & *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000)). A trial court's decision will not be reversed for abuse of discretion unless the trial court "'applie[d] an incorrect legal standard, or reache[d] a decision which is against logic or reasoning that causes an injustice to the party complaining.'" *Id*. (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). This Court, while using the abuse of discretion standard, is not permitted to substitute its judgment in place of the trial court. *Id*.
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> We now turn to Father's issue on appeal regarding the Trial Court's decision to limit Father's visitation with the Younger Child strictly to Chattanooga, thus eliminating Father's exercise of visitation at his home in Ohio. As in custody matters, courts, when determining visitation, are to be guided by the best interests of the child at issue.

> *Turner v. Turner*, 919 S.W.2d at 346. Our Supreme Court determined that when reviewing a trial court's decision regarding visitation, "the child's welfare is given 'paramount consideration' … and the 'right of the noncustodial parent to reasonable visitation is clearly favored.'" *Eldridge v. Eldridge*, 42 S.W.3d at 85 (quoting *Luke v. Luke*, 651 S.W.2d 219, 221 (Tenn. 1983) (citations omitted)). Courts may limit or eliminate the non-custodial parent's right to visitation where "there is definite evidence that to permit … the right would jeopardize the child, in either a physical or moral sense." *Id*. (quoting *Luke v. Luke*, 651 S.W.2d at 221); *see also* Tenn. Code Ann. § 36-6-301 (providing that after a custody determination and upon the request of the non-custodial parent, the court shall grant visitation "unless the court finds, after a hearing, that visitation is likely to endanger the child's physical or emotional health.…").
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> While limiting Father's visitation with the Younger Child to Chattanooga was not an abuse of discretion, we hold that, under these circumstances and in light of Father's right to exercise visitation, imposing such a limitation upon Father's visitation *indefinitely* constitutes error. To limit indefinitely Father's visitation with the Younger Child, who at the time of trial was 10 years old, to take place only in Chattanooga would essentially reward Mother for her misconduct and efforts to sabotage the Father's and Younger Child's relationship. Moreover, the Younger Child's visitation with Father and his family in Ohio may well facilitate their relationship. *See* Tenn. Code Ann. § 36-6-301 (providing that "the court shall, upon request of the non-custodial parent, grant such rights of visitation as will enable the child and the non-custodial parent to maintain a parent-child relationship….") It is undisputed that it is in the Younger Child's best interest to have a positive relationship with Father. We believe this best can be accomplished by allowing visitation in Ohio.…

Bunker, 2002 WL 924211, at *6, 8-9 (emphasis in original).

Unlike the situation in ***Bunker***, the trial court in the instant case clearly expressed its belief that Father's co-parenting time with the child should increase once the child and Father had become more familiar with each other. Presumably this would also include allowing Father to exercise

visitation in North Carolina.[2] The precise and narrow issue we are confronted with on this appeal is whether the trial court abused its discretion with respect to the amount of co-parenting time it granted to Father *given the facts existing at the time of the trial*. In view of the facts presented to the trial court, we cannot conclude there was an abuse of discretion.

Over 11 months have now passed since the trial took place. This Court is unable to ascertain the quantum of visitation that is appropriate at the present time. The current circumstances may be such that Father is entitled to significantly greater visitation as well as visitation outside the presence of Mother at his residence in North Carolina. It may also be appropriate to take Mother up on her offer to drive halfway. If the parties have not reached an agreement as to increased visitation and visitation in North Carolina, Father can accept the trial court's invitation to file a new petition for such relief. It will then be up to the trial court to establish a new regimen of co-parenting time based upon the facts then before the court.

Our decision in this case is a narrow one – we simply hold that we find no abuse of discretion on the part of the trial court in its decision based upon the facts as they existed some 11 months ago.

IV.

The judgment of the trial court is affirmed and this cause is remanded to the trial court for collection of the costs assessed below, pursuant to applicable law. Costs on appeal are taxed to the appellant, Jeremy Humber.

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CHARLES D. SUSANO, JR., JUDGE

[2] Severely limiting an infant child's time with the child's non-custodial father for an extended period of time is a corollary to the long-outdated "tender years" doctrine. *See, e.g.*, T.C.A. § 36-6-412; *see also* ***In re Zaylen R.***, No. M2003-00367-COA-R3-JV, 2005 WL 2384703, at *4 (Tenn. Ct. App. M.S., filed September 27, 2005), *no appl. perm. appeal filed*. Children are best served by the love, demonstrated affection, care, and *presence* of both parents.